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IN THE

Supreme Court of the United States

- HELEN C. FRICK,
Plaintiff in Error,
vs.
COMMONWEALTH OF
PENNSYLVANIA. } 122
No. 449—October Term, 1923.
- HELEN C. FRICK,
Plaintiff in Error,
vs.
COMMONWEALTH OF
PENNSYLVANIA. } 123
No. 450—October Term, 1923.
- ADELAIDE H. C. FRICK, et al.,
Executors, Plaintiffs in Error,
vs.
COMMONWEALTH OF
PENNSYLVANIA. } 124
No. 444—October Term, 1923.
- ADELAIDE H. C. FRICK, et al.,
Executors, Plaintiffs in Error,
vs.
COMMONWEALTH OF
PENNSYLVANIA. } 125
No. 450—October Term, 1923.

Brief for Defendant in Error.

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IN THE
Supreme Court of the United States

- HELEN C. FRICK, Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA. } No. 442 October Term, 1923.
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- ADELAIDE H. C. FRICK, et al., Executors, Plaintiffs in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA. } No. 444 October Term, 1923.
- ADELAIDE H. C. FRICK, et al., Executors, Plaintiffs in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA. } No. 445 October Term, 1923.
-

Brief for Defendant in Error.

Statement of the Case.

All the cases are in this Court on writ of error to the Supreme Court of Pennsylvania. They involve the same facts and the same questions of law.

Henry C. Frick died on the second day of December, 1919. He was domiciled in Pennsylvania during his entire lifetime, and his will was duly admitted to probate in Allegheny County.

The aggregate value of his real estate in Pennsylvania and his personal property wherever situate was \$89,675,098.45. Of his personal estate, \$13,132,391.00 in value thereof consisted of tangibles, principally pictures and other objects of art, situate in the State of New York at the time of his decease and bequeathed to the Frick Collection, a corporation, for purposes of public exhibition in the City of New York. The estate also included \$403,353.00 of tangible personal property, such as furniture, household equipment, and the like, part of which was situated in New York and part in Massachusetts. The value of all tangible personality situated in New York and Massachusetts has been included by the Pennsylvania tax authorities in the measure of the Pennsylvania transfer inheritance tax (Rec. pp. 3 to 4, 17 to 19, 51).

The language used by plaintiffs in error in stating the questions for argument implies that the property bequeathed to the Frick Collection had a "permanent" situs in the State of New York. As the property was personal property, we do not think it material whether its foreign situs was or was not "permanent", but lest some argument be predicated on the suggestion that these objects of art had a fixed situs in New York prior to Mr. Frick's death, we call attention to the following statement of fact, made part of the evidence by stipulation (Rec. p. 17) :

"These works of art were largely antiques and of European and Asiatic origin and before their purchase by Mr. Frick had passed through the ownership of many successive persons and had often been moved from place to place in Europe, Asia and America. Up to the time of his death it continued to be Mr. Frick's practice to sell or exchange works

of art which he owned, usually replacing them with others that he considered more desirable."

Thus the articles which were to comprise the collection for public exhibition were not determined until the death of the testator, and did not have a fixed or permanent situs prior to that time.

The sum of \$6,338,898.68 has been paid to the Federal government as estate tax, and large sums of money have been paid or will be paid to the State of Pennsylvania and other states as inheritance taxes. Those taxes have been paid from the residuary estate, pursuant to Article VIII of the will (Rec. p. 58). The tax authorities of Pennsylvania have refused to deduct them prior to computation of the Pennsylvania tax.

. The inclusion of the value of New York and Massachusetts tangibles in the measure of the tax, and the refusal to deduct the amount of inheritance taxes paid to other jurisdictions and to Pennsylvania, were in accordance with provisions of the Pennsylvania statute as construed by the Supreme Court of that State.

The contentions of plaintiffs in error are two: first, that the provision for the inclusion of foreign tangibles in the measure of the Pennsylvania transfer inheritance tax is in conflict with the due process clause of the XIVth Amendment, and therefore invalid; second, that the provision prohibiting the deduction of inheritance taxes paid to the United States, to Pennsylvania, and to other jurisdictions prior to computation of the Pennsylvania tax is an unconstitutional interference with the taxing power of the Federal government, and is also in violation of the due process clause of the XIVth Amendment.

Argument.

I.

**THE STATE OF DOMICILE OF A DECEDENT
MAY INCLUDE IN THE MEASURE OF ITS
TRANSFER INHERITANCE TAX THE
VALUE OF ALL THE PERSONAL PROPERTY
OF SUCH DECEDENT, INCLUDING TAN-
GIBLES SITUATED IN OTHER STATES.**

It is a fundamental principle that real estate descends pursuant to the law of its situs, without any reference whatsoever to the law of the owner's domicile, and that personal property, whether tangible or intangible, and wheresoever situate, descends pursuant to the law of the owner's domicile. If a resident of New York (whose law requires but two witnesses to a will) makes a will with only two witnesses, realty situated in a state requiring three witnesses will not pass. But *tangible personality*, unlike real estate, descends in the manner provided by the law of the domiciliary state; thus, in the illustration, tangible personality situated in a state requiring three witnesses would pass, even though the will were witnessed by only two persons. The law of the domicile, therefore, may impose upon the transfer of tangible personality, either by will or by intestate succession, such conditions by way of taxation or otherwise as it may deem expedient, provided the conditions are not forbidden by constitutional restrictions. It is mere metaphysics to argue whether the transfer is effected by *virtue* of the law of the situs or the law of the domicile; the *fact* is that tangible personal property passes according to and to no greater extent than pro-

vided by the law of the domicile. Wherever the property may be, the court administering it looks first to the law of the domicile.

That principle, which is the basis of the Pennsylvania tax, was thus stated by Mr. Justice Holmes in *Bullen vs. Wisconsin*, 240 U. S. 625:

“The power to tax is not limited in the same way as the power to affect the transfer of property. If this fund had passed by intestate succession, it would be recognized that by the traditions of our law the property is regarded as a *universitas* the succession to which is incident to the succession to the *persona* of the deceased. As the states where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, *in a practical sense at least, the law of the domicil is needed to establish the inheritance.* Therefore the inheritance may be taxed at the place of domicil, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock.” (Italics ours.)

It is admitted at the outset that Pennsylvania may not constitutionally impose a tax upon tangible personal property situated outside the State.

Union Refrigerator Transit Company vs. Kentucky, 199 U. S. 194.

But the Pennsylvania tax is not imposed upon any specific property whatever. A sum of money computed

upon the value of the estate, such value being determined as of the date of death, is lawfully exacted by the Commonwealth for a privilege created by statute. The tax is an excise upon the privilege of transfer. It is not upon the privilege of receiving—affirmative legislation is not needed to permit acceptance of a gift—but upon the statutory privilege of transferring or transmitting property by will or intestacy.

The Supreme Court of Pennsylvania, construing the Act of the Legislature of Pennsylvania, has so defined and described this tax (Record, pp. 100-101; *Kirkpatrick's Estate*, 275 Pa. 271). Their construction will be accepted by this Court unless it is a plain disregard of the words of the Act and makes use of an incorrect definition to effect an evasion of constitutional inhibitions. That is to say, if the Act actually provided for a tax on property beyond the boundaries of Pennsylvania, the fact that the state court defined it as an excise upon the privilege of transfer would not save its constitutionality.

International Paper Company vs. Massachusetts, 246 U. S. 135.

Obviously, however, no such incorrect construction has been made here.

The nature of inheritance taxes of all types received a very full discussion in *Knowlton vs. Moore*, 178 U. S. 41, from which it appears that inheritance taxes have seldom, if ever, taken the form of taxes on property. In that case Mr. Justice White said at page 47:

“Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal, as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of the property as the result of death as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy.”

To like effect are:

United States vs. Perkins, 163 U. S. 625;
Magoun vs. Illinois Trust & Savings Bank, 170
U. S. 283.

That such transfer inheritance taxes are not property taxes is necessarily implied in the conclusion that United States bonds or other clearly non-taxable securities are properly included in the property upon which the tax is computed.

Plummer vs. Coler, 178 U. S. 115.

Similarly, no one has doubted that the Federal inheritance tax should be computed upon the obligations of a state, which the Federal government may not tax directly.

It is clear, therefore, that in holding the tax not to be on property, but rather an excise upon the privilege of transfer, the State Supreme Court has not undertaken to save an invalid property tax by incorrectly denominating it an excise. *International Paper Company vs. Massachusetts, supra*, has no application to this case.

Since a transfer inheritance tax is not a property tax, and since property which, by reason of its tax-exempt character, is beyond the jurisdiction of the taxing state may be included in the property upon the value of which the tax is computed, it would seem to follow as a corollary that personal property which, by reason of its geographical situation, is beyond the jurisdiction of the taxing state may, under some circumstances, be included. The case of *Maxwell vs. Bugbee*, 250 U. S. 525, arose under the inheritance tax statute of New Jersey, which provided for a tax graduated according to the value of the estate, and provided further that in respect to the property of a nonresident situated in New Jersey, the *rate* of tax should be determined by the value of the total estate wherever situate, and that the *amount* of the tax should be that proportion of what the total tax would be if the entire estate were situated in New Jersey which the New Jersey estate of the decedent bore to the entire estate wherever situated. The statute was held to be constitutional. Even a state other than that of the domicile, therefore, need not wholly disregard foreign personality.

The cases pertinent to the question of what property is or is not subject to state transfer inheritance tax may be classified as follows, so far as the classification has reference to the situs of the property:

1. Where the situs of the property transferred is outside the taxing state, and the decedent was a non-resident of the taxing state. The transfer is not taxable.

2. Where the property is real estate situated outside the taxing state. The transfer is not taxable, even though the taxing state is the state of decedent's domicile. The reason is, of course, that realty descends without reference to any law except that of the situs.

DeWitt's Estate, 266 Pa. 548;
Marr's Estate, 240 Pa. 38.

3. Where the property is intangible, as stocks of foreign corporations, or other securities kept outside the taxing state, which is also the state of decedent's domicile. The transfer is taxable, since the property passes according to the law of the domiciliary state.

Bullen vs. Wisconsin, 240 U. S. 625.

4. Where the property is intangible, as stocks of a domestic corporation or a debt owed by a resident of the taxing state to the decedent, who was a nonresident of that state. Since the taxing state has jurisdiction of and control over the corporation whose stock is in question, or the person of the debtor, the transfer is taxable.

Blackstone vs. Miller, 188 U. S. 189.
Greves vs. Shaw, 173 Mass. 205;
Hostetter's Estate, 267 Pa. 193;

5. Where the property is a chose-in-action and therefore intangible, but is evidenced by a promissory note and hence has no existence apart from the paper upon which the obligation is written, and the paper has an actual physical situs within the taxing state. There, even though the deceased holder of the note was a non-

resident of the taxing state, and the maker is also a nonresident, the note itself is within the control of the taxing state, and the transfer of it may be taxed.

Wheeler vs. Sohmer, 233 U. S. 434.

6. Where the property is tangible personality situated in the taxing state, of which the decedent was a nonresident. Since the property is within the jurisdiction and control of the taxing state, the transfer is taxable.

Coe vs. Erroll, 116 U. S. 517;
Blackstone vs. Miller, 188 U. S. 189.

7. Where the taxing state is also the state of the decedent's domicile, and where the property is tangible personality having a situs outside the state,—the case at bar. There again the transfer is taxable. In *Blackstone vs. Miller*, *supra*, Mr. Justice Holmes, in the opinion of the Court, said:

“To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a universitas and is taken into account again in the succession tax there.” (Italics ours.)

In *Bullen vs. Wisconsin*, 240 U. S. 625, it was held that the domiciliary state could constitutionally impose an inheritance tax on the transfer of bonds kept outside the state. In that case, the Court has ruled the case at bar, because the obligation of a bond, like the obligation of a promissory note but unlike the property

represented by a stock certificate, has no existence apart from the paper upon which the obligation is written.

Wheeler vs. Sohmer, 233 U. S. 434;
Blackstone vs. Miller, 188 U. S. 189, 206.

In *Carpenter vs. Pennsylvania*, 17 How. 456, it was held that personal property situated outside the domiciliary state was subject to the inheritance tax thereof. The property expressly described in the report consisted of intangibles. It is not altogether clear whether any tangible property was involved, but the opinion does not suggest that the point would be material.

In *Hartman's Estate*, 70 N. J. Eq. 664, it was squarely held that the transfer of tangible personality owned by a resident decedent but situated outside the state was taxable. In *Swift's Estate*, 137 N. Y. 77, the Court of Appeals of New York, with one dissent, reached the same conclusion. The same decision was reached by the Supreme Court of Washington in *Sherwood's Estate*, decided December 29, 1922, and reported in 211 Pac. Rep. 734.

In *Weaver's Estate*, 110 Iowa 328, it was held that the transfer of certain tangibles having a foreign situs was not subject to state inheritance tax, but the decision was based entirely upon the intent of the legislature as expressed in the statute—it seems to have been conceded that if the statute had in fact provided for a tax on the transfer of foreign tangibles it would still have been a valid statute.

The law of England is in accord with the authorities above cited. In *Matter of the Estate of Ewin*, 1 Crompton and Jervis, 150 (1830), the Court of Exche-

quer held that American, Austrian, French, and Russian stocks owned by a decedent domiciled in England were subject to English legacy duties. In *Attorney General vs. Napier*, 6 Exchequer Reports, 216 (1851), a case where the decedent was an army officer domiciled in England but on duty in India at the time of his death, the same rule was applied to tangibles in India.

In *Re Duchess of Manchester*, Law Journal Reports, New Series, Vol. 81, page 329 (1912), the rule of *Attorney General vs. Napier* was again applied. The Duchess of Manchester, domiciled in England, provided in her will that certain individuals in England should be executors in respect to property in England, and that certain other individuals, in America, should be executors of the will in respect to property in America. The Chancery Division held that all personalty in America was subject to estate tax in England and, moreover, that the executors in England were bound to pay the tax, even though the property in America was never to come into their possession. Mr. Justice Swinfen Eady said:

“It is well established that whether legacy or succession duty is payable in respect of personal property depends on the domicil of the testator, and is not affected by the question where the property may happen to be locally situate at the death.”

Thus far no reference has been made to the maxim *mobilia sequuntur personam*. Such reference has been purposely omitted, because the maxim is sometimes called a “fiction”, and it is not desired to base this argument upon fiction, but upon fact. The fact is that though the tangible personalty here in question is situ-

ated in New York and Massachusetts, it cannot be transferred by inheritance except with reference to the provisions of Pennsylvania law. That fact, stated by Mr. Justice Holmes in *Bullen vs. Wisconsin, supra*, by the proposition that "the law of the domicil is needed to establish the inheritance", cannot be gainsaid.

The theory of plaintiffs in error is that Massachusetts and New York statutes have incorporated Pennsylvania law by reference, thereby changing it to Massachusetts or New York law. Our own theory is that by the comity of states (in this case evidenced by statutes) and the traditions of Anglo-Saxon jurisprudence, the domiciliary law is given extra-territorial effect in this situation. But whether the correct explanation be the one theory or the other, there can be no doubt of the *fact*, namely, *that the transfer of this property cannot be effected without reference to the provisions of Pennsylvania law*. That law is "needed to establish the inheritance."

Plaintiffs in error lay special emphasis on the fact that statutes of New York and Massachusetts provide in express words that the property shall pass according to Pennsylvania law. But can it be doubted that the provisions of Pennsylvania law would be given effect in New York and Massachusetts even in the absence of such statutes? The statutes are merely declaratory of a familiar principle. If they provided, as they do not provide, that the law of the domiciliary state should be ignored, as in the case of realty, and that all tangible personal property in New York and Massachusetts should pass in accordance with the laws of New York and Massachusetts and not otherwise, they would afford to plaintiffs in error a stronger argument.

It is clear that if Mr. Frick had made a bequest of tangibles in New York, which bequest was absolutely void by Pennsylvania law, the beneficiary could not have taken the property, even though such a bequest had not been prohibited by the laws of New York.

In some future case, this Court may have to consider the situation where a gift valid by the domiciliary law is, for reasons of local policy or otherwise, made absolutely void by affirmative legislation of the state of the *situs*. But that is not this case. Plaintiffs in error direct attention to the fact that the testator bequeathed to charity a larger portion of his property than is permitted, as against the widow and children, by New York statutes, and that the charitable gift of New York personal property took effect only because the widow and children "ratified" it. The fact that it did take effect, though as a result of such ratification, is sufficient proof that it was not void, but only voidable at suit of the widow and children, the statute being for their individual protection rather than an expression of a local policy against giving effect to such charitable gifts. Notwithstanding the ratification, the particular charity took by virtue of the words of gift contained in the will. The transfer in question, valid by Pennsylvania law, actually has been effected, notwithstanding the New York statutes.

Even if the charitable bequest had been absolutely void by the laws of New York, transfer of the property comprehended in it would not have escaped taxation by Pennsylvania, for void gifts either fall into residue or create an intestacy, and in either event the New York courts would have looked to the laws of Pennsylvania to ascertain the persons entitled. The law of the domicile would still have been "needed to establish the inheritance".

Plaintiffs in error have cited several cases wherein this Court has held to be invalid state statutes imposing capital stock and franchise taxes on domestic corporations when property having a situs outside the taxing state was included in the property taxed. Those were cases of taxes on property, hence have no application here, because the inheritance transfer tax of Pennsylvania is not a tax on property. In *Union Refrigerator Transit Company vs. Kentucky*, 199 U. S. 194, 211, one of the cases cited by plaintiffs in error, the Court expressly pointed out that inheritance and succession taxes "are controlled by different considerations."

Plaintiffs in error cite also *Looney vs. Crane Company*, 245 U. S. 178, and *Wallace vs. Hines*, 253 U. S. 66, wherein the taxes considered were corporation excise taxes, and the court held the statutes imposing them to be invalid because property outside the taxing state was included in measuring the amount of the excise. In those cases, however, the complaining corporations were foreign corporations, not created by the taxing state and having their domicile elsewhere. We have not succeeded in finding a decision where this Court has applied the same rule in the case of a corporation domiciled in the taxing state, but even such a decision would not be especially relevant to this argument, because no state adopts as its law of foreign corporations the laws of the several states by which the numerous foreign corporations operating within its boundaries were created. The corporation laws of foreign states are neither incorporated by reference nor given extra-territorial effect. Cases involving corporation excise taxes are not analogous to cases involving transfer inheritance taxes, since in the former the principles of comity and the traditions of our law applicable to the latter do not apply.

Plaintiffs in error cite the case of *Colorado vs. Harbeck*, 232 N. Y. 71, for the proposition that the transfer of tangible personality situated in New York is not subject to inheritance taxes of another state, even though the decedent was domiciled in such other state. The case is not authority for that proposition. The court did not determine or undertake to determine the validity of the tax imposed by the foreign state, but merely held that the tax, whether valid or invalid, could not be recovered in a suit brought in New York. The ground of decision was the familiar principle that a tax is not a debt, and therefore cannot be recovered outside the boundaries of the jurisdiction imposing it. If personal service on the defendant had been obtained within the boundaries of the taxing state and judgment entered there, we have no doubt that the Court of Appeals of New York would have allowed recovery in an action brought upon the judgment.

Plaintiffs in error give particular attention to refuting the proposition that the domiciliary state may make the transfer of property within its borders conditional on the payment of inheritance taxes upon all the property of decedent wherever situated. That proposition has its limitations. We did not advance it in the court below, and we do not rely upon it here.

The argument of plaintiffs in error comes down to the novel proposition that in this class of cases the line should be drawn between tangible property, whether real or personal, on the one hand, and intangible property on the other, and not between real property and personal property. The proposition may or may not be sound when taxes on specific property are involved. But

it is clearly unsound when applied to transfer inheritance taxes. Whether a decedent's property be transferred by will or intestate succession, the real estate passes in accordance with the law of the situs—what the domiciliary law may provide is immaterial. But if the property be personalty, then whether it be tangible or intangible, pictures or stocks, the persons entitled must be determined by reference to the provisions of the domiciliary law. As a matter of history and practice the line is drawn between real estate and personal property. As was observed in *New York Trust Company vs. Eisner*, 256 U. S. 345, 349, "Upon this point a page of history is worth a volume of logic."

If the case of *State Tax on Foreign Held Bonds*, 15 Wall. 300, be read together with *Bullen vs. Wisconsin*, 240 U. S. 625, the true principle appears, namely, that while foreign personalty cannot itself be taxed, nevertheless an inheritance tax upon the transfer of personalty kept outside the state and owned by a resident decedent is wholly valid.

II.

INHERITANCE TAXES PAID TO PENNSYLVANIA, TO OTHER STATES, AND TO THE UNITED STATES, ARE NOT DEDUCTIBLE.

Prior to the present Act, the Pennsylvania statute providing for taxation of inheritances was the Act of May 6, 1887, P. L. 79, which prescribed that the measure of the tax should be the "clear value" of the estate. In *Otto's Estate*, 257 Pa. 155, the Supreme Court of Pennsylvania held that inheritance taxes paid by the estate of a Pennsylvania decedent to states other than Pennsylvania should be deducted in determining the amount upon which the Pennsylvania tax should be computed. The ground of decision was that until such deduction should be made, the measure of the tax, namely, the "clear value" of the estate, could not be arrived at. In *Knight's Estate*, 261 Pa. 537, the Supreme Court of Pennsylvania held that the Federal estate tax, also, should be deducted, and again for the reason that the Legislature had intended such deduction.

Article I, Section 2, of the present Act (Act of June 20, 1919, P. L. 521) makes the "clear value" of the estate still the measure of the tax, but goes farther, and in the following language defines "clear value":

"In ascertaining the clear value of such estates, the only deductions to be allowed from the gross values of such estates shall be the debts of the decedent and the expenses of the administration of such estates, and no deduction whatsoever shall be allowed for or on account of any taxes paid on such estates to the Government of the United States or to any other State or Territory."

The intent of the Legislature that foreign state and Federal taxes shall not be deducted has thus been made plain, and the *ratio decidendi* of *Otto's Estate* and *Knight's Estate* has disappeared. Accordingly, the Supreme Court of Pennsylvania, in *Kirkpatrick's Estate*, 275 Pa. 271, and in the case at bar, has held that such taxes are not deductible.

Plaintiffs in error contend, however, that insofar as the statute provides that taxes paid to foreign states and to the United States shall not be deducted, and insofar as it does not provide that taxes paid to the State of Pennsylvania shall be deducted, it is in conflict with provisions of the Constitution of the United States.

The argument made for deduction of the taxes imposed by foreign states is that the states where the property, if tangible, is situated, or, if the property is intangible, the states where bonds or stock transfer books are kept, or where one owing money to the estate resides, impose taxes upon the transfer of the property thus under their control, and impose such taxes before the domiciliary executors may get possession of the property, wherefore such taxes are "paramount" and must be deducted before computation of the Pennsylvania tax; otherwise, the Pennsylvania tax is a "tax on taxes", for the property taxable by foreign states is diminished by the amount of taxes paid to those states.

Illustrating that argument, counsel for the executors state in their brief that before the States of Kansas and West Virginia would permit stocks of Kansas and West Virginia corporations, owned by the estate, to be transferred to the executors on the books of the issuing corporations, those States required payment of large

sums of money as inheritance taxes, by the amount of which the value of the stocks "for administration purposes in Pennsylvania" was reduced.

But the stocks were transferred to *somebody* at the moment of the testator's death; if that were not so, they would have been for a considerable period without an owner. At the moment of transfer the stocks had a definite market value, which was not increased or diminished by the expense the executors might be under in selling them to a third person or in reducing them to their personal possession afterwards. Pennsylvania was not required to adopt as the measure of its tax the value of the stocks to the executors, or their "value for administration purposes in Pennsylvania", but very properly adopted market value at the date of the testator's death—when his interest ceased.

As was pointed out by this Court in several cases above cited, the transfer of title to stocks of foreign corporations owned by this estate could not be effected without invoking the provisions of Pennsylvania law. In *Blackstone vs. Miller*, 188 U. S. 189, 207, Mr. Justice Holmes said that both the law of the state having physical control of a debtor and the law of the decedent's domicile must be invoked to effect the transfer of a debt. But he did not suggest that the one or the other law was "paramount". If superiority of the state having control of the debtor or issuing corporation, over the state of the domicile of the decedent, does in fact exist, which we decline to admit, it is a superiority of *power* and not of *right*. That point, we think, was overlooked in *Matter of the Estate of Henry Miller*, 184 Calif. 674, cited by plaintiffs in error.

The fallacy of the argument that the value of foreign property is reduced by the amount of inheritance

taxes paid to foreign states lies in failing to observe the fundamental principle of inheritance taxation, namely, *that the tax is not upon or out of the property, but upon the privilege of transfer.* The domiciliary state grants one privilege, and the state where the stock transfer books are kept grants or allows another, and each state taxes, at a rate considered fair by its legislature, the privilege conferred by its laws. But neither taxes the property transferred or takes any part of that property. As well might it be argued that an inheritance tax computed upon the value of an estate including United States bonds is a taking or extinguishing of part of the value of the bonds. That argument cannot be made successfully since the decision of *Plummer vs. Coler*, 178 U. S. 115.

The argument that the Federal estate tax must be deducted is based principally upon two propositions: first, Pennsylvania's refusal to deduct is an interference with the "paramount" taxing power of the United States; second, it is in violation of the due process clause of the XIVth Amendment.

In *New York Trust Company vs. Eisner*, 256 U. S. 345, the validity of the Federal estate tax was drawn in question on the ground that it was a direct tax and therefore invalid because not apportioned, and on the further ground that if it was an indirect or transfer tax, it was cast upon the transfer while the latter was being effectuated by the state, and was consequently an interference by the Federal government with state processes. Those questioning its validity laid special emphasis on the fact that the privilege of transfer was created by state laws exclusively, which was not doubted. This Court held both grounds of objection insufficient and

sustained the tax, on authority of *Knowlton vs. Moore*, 178 U. S. 41.

We refer to *New York Trust Company vs. Eisner* because it applies, *a fortiori*, to the case at bar. If a tax by the Federal government on a privilege created exclusively by a state, such tax accruing at the instant of transfer, is not an unconstitutional interference with state processes, how can a similar tax imposed by the jurisdiction which itself creates the privilege be an unconstitutional interference with Federal processes?

On careful analysis it appears that if either the state or the Federal government be "paramount" in this field, it is the state and not the Federal government. The privilege of transfer is granted, affirmatively and exclusively, by state legislation. Take that legislation away, and the privilege now taxed by Congress does not exist. If the state does not take the privilege away entirely, but limits it, as, for example, by conditioning it upon payment of a tax to the state, the privilege taxed by Congress is the privilege as so limited and so conditioned. The condition inheres in the privilege, and if the condition is not performed, there is no privilege for Congress to tax. Thus the state comes first. *Hyde vs. Woods*, 94 U. S. 523, is an illustration of the principle we have in mind.

The difference between Pennsylvania's refusal to deduct the amount of the Federal tax and any attempt to impose a state tax on a Federal instrumentality is of course obvious. Since the state tax is not upon property, no moneys paid or payable to the Federal government are in fact taxed. There can be no constitutional objection to including such moneys in the measure of the tax, since, under this Court's decision in *Plummer*

vs. Coler, 178 U. S. 115, even United States bonds may be included in that measure.

Inheritance taxation is not an instance of concurrent state and Federal jurisdiction under the Constitution. In cases of concurrent jurisdiction, if the Federal government acts, of course its legislation is "paramount". Here is merely a case where both state and Federal government impose privilege taxes, each adopting substantially the same subject and the same measure.

If plaintiffs in error are correct in their argument that Pennsylvania has interfered with the "paramount" taxing power of the United States, it is not enough that she deduct the amount of the Federal tax. The state should withdraw entirely from the field of inheritance taxation, for if the Federal taxing power in that field is "paramount", it is difficult to see why it is not also exclusive so long as Congress sees fit to tax the transfer of estates—as in the case of bankruptcy. That result would be anomalous, to say the least, since the subject of the tax is created by the state exclusively. And if, because Congress has taxed the transfer of estates, the states may not do so, then, by the same token, they may not impose stamp taxes on transfers of stock *inter vivos* or excises on the privilege of doing business in the corporate form. The argument of plaintiffs in error leads, curiously enough, to no great increase of Federal power, but does lead to an incalculable decrease of state power.

So long ago as 1824, in *Gibbons vs. Ogden*, 9 Wheaton, 1, 198, Mr. Chief Justice Marshall pointed out that neither Federal nor state taxing power is "paramount" in respect to the other. He said:

"The power of taxation is indispensable to their (the states') existence, and is a power which, in its own nature, is capable of residing in, and being exercised by different authorities at the same time. * * * Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. That does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other."

Plaintiffs in error do not carry their argument of Federal superiority to the point of asserting that the Federal power is exclusive, but go only part way. They say that the Pennsylvania tax as now computed interferes with the "paramount" taxing power of the United States, and then point out that such interference will be eliminated if the Federal tax is deducted before computation of the state tax. By inference, therefore, they admit that the state and Federal taxing powers may operate upon the one subject. Having made that admission—and granting, for the sake of argument, that the Federal government is "paramount"—they are under the necessity of showing that collection of the state tax *actually* interferes with collection of the Federal tax. They must show, for example, that the estate is not large enough to pay in full the taxes of both jurisdictions. That situation does not exist in this case—the point made by plaintiffs in error is merely academic.

The argument that Pennsylvania's refusal to deduct the Federal tax violates the due process clause of the XIVth Amendment reduces itself to the proposition that before the state tax accrues, the estate has already been reduced by the amount of the Federal tax. This Court answered that argument very fully in *New York Trust Company vs. Eisner*, 256 U. S. 345, by holding specifically that the Federal tax is not a direct tax on the property comprised in the estate, but only an excise on the transfer. Since it is not on the property, the estate transferred is not reduced at all, and the state tax is not a "tax on taxes".

It is said to be unfair and unjust that the residuary legatees must pay a tax measured by the entire residue, when the will directs that all inheritance taxes be paid out of that fund, which is accordingly reduced. If the result be unjust, the fault lies with the testator, and not with the law. The testator has himself imposed upon the residuary legatees the burden of paying taxes on the gifts to themselves and upon all other gifts made by the will. He may place the incidence of inheritance taxes where he wishes as between the beneficiaries, but he is incapable of removing any part of his estate from the operation of the law.

Matter of Swift, 137 N. Y. 77;
Matter of Penfold, 149 N. Y. Supp. 918 (Affirmed 216 N. Y. 171);
In re Week's Estate, 169 Wis. 316.

So far as we are aware, in this case it is argued for the first time that the tax of the taxing state itself must be deducted. In *Matter of Gihon*, 169 N. Y. 443, the

Court of Appeals of New York, apparently considering that such an argument would be absurd, said:

"It is said to be unjust to tax the recipient of a legacy for \$10,000 on its full amount, as \$500 has been exacted from him by the Federal Government. This argument is equally applicable to our own taxation."

This question of deducting the taxes of other jurisdictions is not a new one. It has been raised in many state courts, and always has been dealt with as a problem of construing the particular statute. When deduction has been allowed, it has been on the ground that the legislature *intended* it to be allowed, and when not allowed, it has been because the statute under consideration, as construed by the court, did not provide for such allowance. In *Matter of Gihon*, 169 N. Y. 443, the Court of Appeals of New York held that the Federal legacy tax imposed by Act of Congress in 1898 (30 Stat. at L. c. 448, Sections 29 and 30) was not deductible prior to computation of the New York tax. In *Succession of Gheens*, 148 La. 1017, *Week's Estate*, 169 Wis. 316; *Bierstadt Estate*, 178 App. Div. (N. Y.) 836, *Penfold's Estate*, 216 N. Y. 171, *Matter of Sherman*, 179 App. Div. 497 (Affirmed 222 N. Y. 540). *Sanford's Estate*, 188 Iowa 833, and *Hazard vs. Bliss*, 43 R. I. 431, the several state statutes were construed as not providing for deduction of inheritance taxes paid to other jurisdictions, and accordingly such taxes were held not deductible. Five state courts of last resort, therefore, besides the Supreme Court of Pennsylvania in the case at bar and in *Kirkpatrick's Estate*, 275 Pa. 271, observed no invalidity of statutes providing that deduction should not be allowed. In *Hooper vs. Shaw*, 176 Mass. 190, *State vs. Probate Court*, 97 Minn. 532, *People vs. Pasfield*, 284 Ill. 450, *People vs. Northern Trust Company*, 289 Ill.

475, *Knight's Estate*, 261 Pa. 537, *Otto's Estate*, 257 Pa. 155, *Roebling's Estate*, 89 N. J. Eq. 163, *State vs. First Calumet Trust & Savings Bank*, 71 Ind. Appellate 467, *People vs. Bemis*, 68 Col. 48, *Corbin vs. Townshend*, 92 Conn. 501, and *Old Colony Trust Company vs. Burrell*, 238 Mass. 544, the courts were of opinion that the statutes under consideration, correctly construed, provided for deduction of the Federal inheritance tax, or the inheritance taxes of other states, or both, and accordingly held such taxes deductible. But except in *Kirkpatrick's Estate* and in the case at bar, the question has always been considered as one of statutory construction, and not of constitutional power.

In *New York Trust Company vs. Eisner*, 256 U. S. 345, this Court held that New York legacy taxes were not deductible before computation of the Federal tax, and Section 403 (a) (1) of the Revenue Act of 1921 expressly provides that state taxes shall not be so deducted.

The majority opinion of the Supreme Court of Rhode Island in *Hazard vs. Bliss, supra*, contains the following language:

"In *Gibbons vs. Ogden*, 9 Wheat. 1, page 197, 6 L. Ed. 23, Chief Justice Marshall comments upon the authority of the national government and of a state government to each exercise the power of taxation which is indispensable to their existence, and says that the grant of power to Congress to levy and collect a tax has never been understood to interfere with the exercise of the same power by the state. In the matter before us the nation and the state has each sought to tax the right to transfer. By entering the same field of taxation, equally open to each, neither sovereign has diminished the subject of the tax, nor has it reduced the revenues of

the other. By the use of the same measure neither has impaired that measure. When the federal government taxed the right to transfer the net estate, it did not reduce the net estate nor that portion which our law permitted the testator to transfer to the residuary legatee; although by reason of the collection of the Federal tax the amount which the residuary legatee received was diminished."

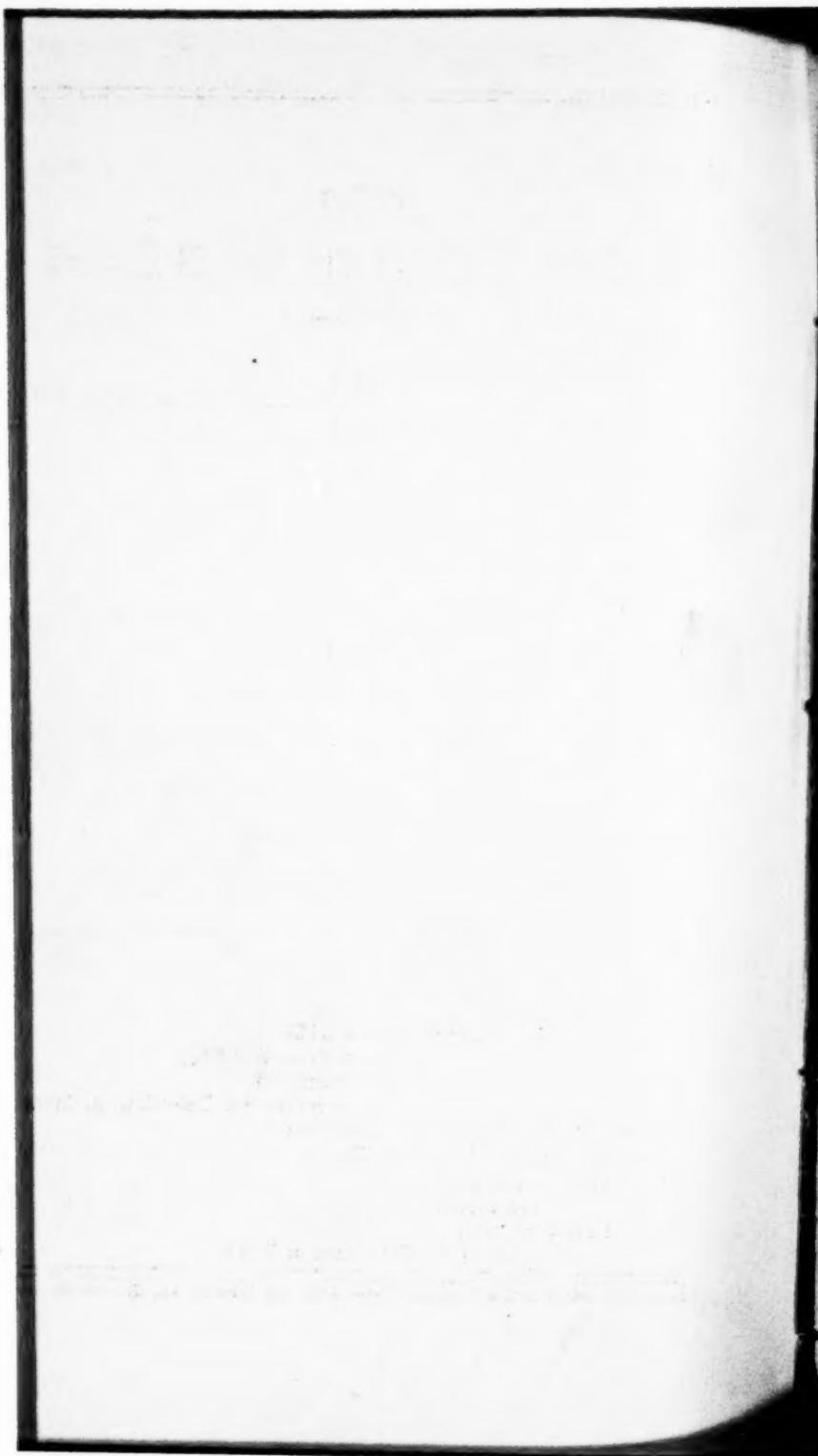
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IN THE

Supreme Court of the United States

HELEN C. FRICK,
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v.
COMMONWEALTH OF
PENNSYLVANIA.

122

No. 442 October
Term, 1923.

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No. 445 October
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Brief on Behalf of the State of New York and of Its Attorney General.

CARL SHERMAN,

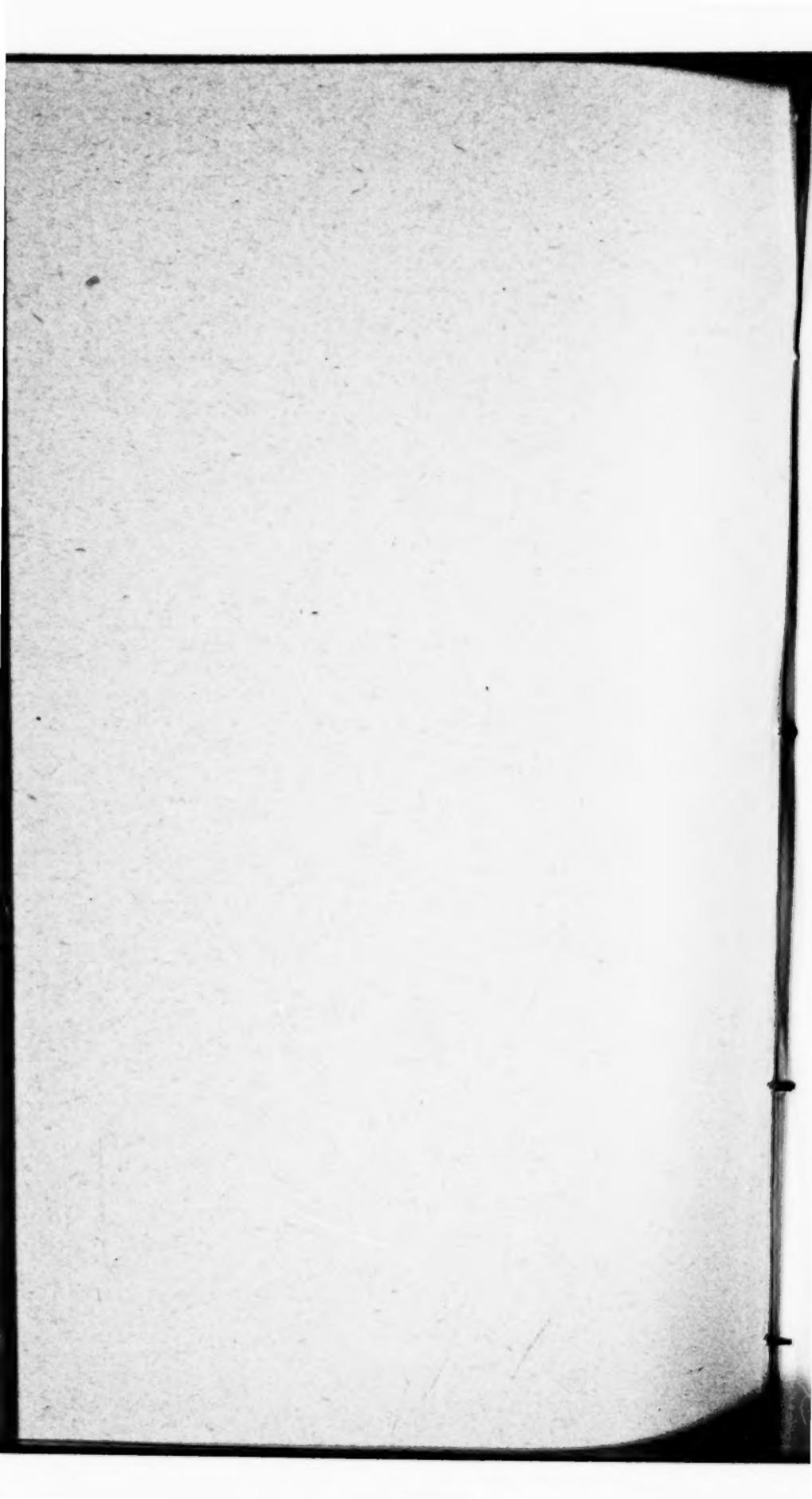
Attorney General.

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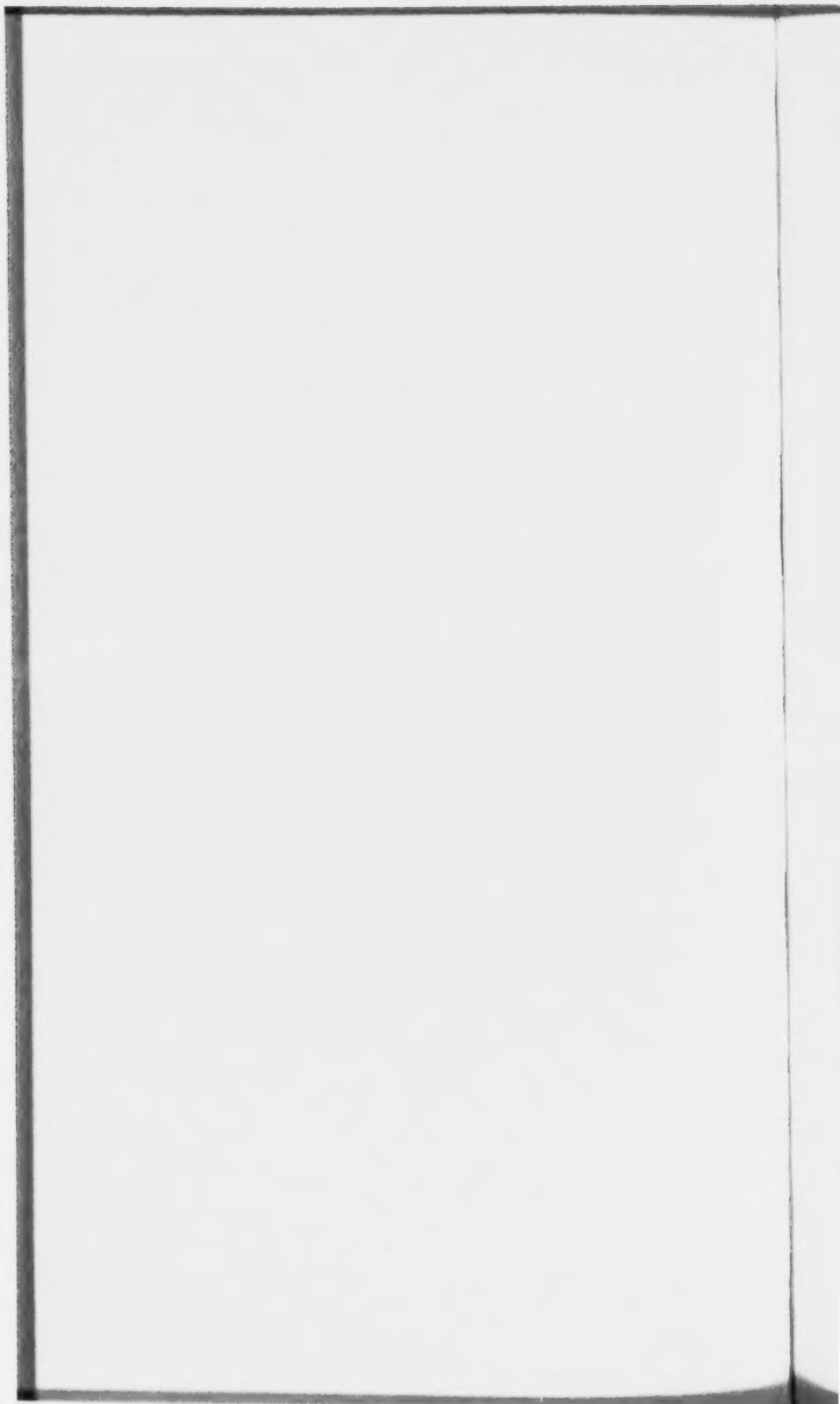
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**BRIEF SUBMITTED ON BEHALF OF THE
STATE OF NEW YORK**

STATEMENT

Through the courtesy of counsel for the respective parties and by permission of this court, the State of New York through its attorney-general

and the attorney-general of the State of New York in his official capacity, file this brief *amici curiae* in connection with the assignments of error wherein it is claimed that the Pennsylvania transfer tax should be imposed on the estimated tax value of the estate only after the deduction therefrom of the amounts paid to the United States as an estate tax and to other states as taxes on the transfer of shares of stock.

The State of New York is interested in these questions for the reason that a determination by this court that the federal tax and taxes of other states must be deducted in computing the Pennsylvania tax, would probably be controlling in the application of the New York transfer tax act and require the deduction of such taxes in computing the New York tax. This would result in a very material loss of revenue to New York and require the refunding of enormous sums of money representing taxes heretofore paid to New York.

The question of the deduction of taxes paid to other states will be covered by the argument presented in relation to the deductibility of the federal tax, it being believed that the position taken in Point I is conclusive in respect to the former.

ARGUMENT POINT I

EACH SOVEREIGN STATE HAS THE RIGHT TO DETERMINE FOR ITSELF IN WHAT MANNER THE TAX UPON TRANSFERS SHALL BE MEASURED, AND THE ENACTMENT BY THE LEGISLATURE OF PENNSYLVANIA REFUSING TO ALLOW THE DEDUCTION OF THE FEDERAL ESTATE TAX IN NO WAY INFRINGES UPON THE CONSTITUTION OF THE UNITED STATES.

In *New York Trust Co. v. Eisner*, 256 U. S. 345, it was decided that the New York State transfer tax and similar taxes of other states are not to be deducted in arriving at the base for the federal estate tax, but it was said (p. 350):

“What amount New York may take as the basis of taxation and questions of priority between the United States and the State are not open in this case.”

On this appeal the questions so reserved are to be considered. The New York statute and the Pennsylvania statute are alike in effect, the difference being that the non-deductibility of the federal tax under the New York act is established by construction of the courts, whereas the Pennsylvania act establishes this feature by express language.

That the transmission of property from the dead to the living presents a universal subject of taxation, upon which may be rested the authority of both congress and the legislatures

of the states to impose transfer taxes, is well settled. These taxes are in the nature of excises or privilege taxes, not taxes upon property, and may therefore be measured in any reasonable manner. In *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, this principle is set forth in the following language:

“The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, *and those of like character, so long as they proceed within reasonable limits and general usage,* are within the discretion of the State Legislature, or the people of the State in framing their Constitution.” (Italics ours.)

In *Flint v. Stone Tracy Co.*, 220 U. S. 107, 167, this court say:

“We must not forget that the *right to select the measure and objects of taxation* devolves upon the Congress and not upon the courts, and such selections are valid unless constitutional limitations are overstepped.” (Italics ours.)

"Limitations are to be found in the words and intendment of the Constitution and the fundamental principles of government embodied therein. The taxing power, both direct and through an inheritance tax, is very broad and submits to few restrictions. Such laws need not be submitted to courts for their approval and can only meet with disapproval when some fundamental principle has been violated." *Matter of Watson*, 226 N. Y. 384, 393.

It is submitted that a tax upon a privilege may be measured in many ways. No doubt a tax of a fixed amount upon all transfers, as, for example, a tax of \$50 on every transfer where the value of the property exceeded \$500, would be sustained, even though the effect would be to tax a transfer of \$501 exactly the same as a transfer of millions of dollars. A transfer tax may be measured by the gross estate, it may be measured by the net estate or it may be measured by the amounts passing to beneficiaries. A state, if it sees fit, may provide that, for the purpose of establishing the base by which its transfer tax is to be measured, the amount paid to the United States as a transfer tax, shall be deducted from the value of the property passing, and it may with equal propriety provide that the base shall be the value of the property without deduction of the federal tax.

Perhaps no better illustration of the discretion vested in legislative authority to measure privilege taxes by different standards and in different ways can be found than the action of congress in imposing the Spanish war tax on the amounts passing to individual beneficiaries with an

exemption to each and graded by the amounts received by individual beneficiaries, and its action in measuring the present tax by the net estate with only one exemption and graded according to the value of the net estate. The constitutionality of the former tax was sustained in *Knowlton v. Moore*, 178 U. S. 41, and of the latter in *New York Trust Co. v. Eisner, supra*.

Another illustration of the latitude of the legislature in establishing the basis for the measurement of transfer taxes is found in the decision of the Court of Appeals of New York in *Matter of White*, 208 N. Y. 64. The New York transfer tax act provides for the taxation of life estates upon the value determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies. The life tenant died before the transfer tax was fixed. It was held that the foregoing statutory rule must apply, even though it resulted in the imposition of a greater tax than if the value of the life estate had been measured according to the actual duration of life of the life tenant.

But the right of a state to impose transfer taxes is not limited to the universal subject of taxation. It rests in part upon the power to regulate succession, which is vested solely in the states. State authority to tax transfers is therefore greater and subject to fewer restrictions than is the authority of the federal government.

In sustaining the right of the State of Louisiana to impose death duties in *Mager v. Grima*, 8

How. 490, 493, Mr. Chief Justice Taney, speaking for this court, said:

“* * * The law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * If a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.”

In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288, it was said:

“The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.”

There are many decisions holding that the power of states to levy transfer taxes is derived in part from the right to regulate the succession to property, from a few of which excerpts are here given:

“* * * the so called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a

declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

United States v. Perkins, 163 U. S. 625, 628.

In the able dissenting opinion of Mr. Justice Holmes, in *Chanler v. Kelsey*, 205 U. S. 466, 479, he says:

"A state succession tax stands on different grounds from a similar tax by the United States or a general state tax upon transfers. It is more unlimited in its possible extent, if not altogether unlimited, and therefore it is necessary that the boundaries of the power to levy such taxes should be accurately understood and defined.

"I always have believed that a state inheritance tax was an exercise of the power of regulating the devolution of property by inheritance or will upon the death of the owner, — a power which belongs to the states; and I have been fortified in my belief by the utterances of this court from the time of Chief Justice Taney to the present day."

"The beneficiary has no claim to the property of an ancestor except as given by law, and, if the state has a right to impose a tax at all upon the passing of property, the transferee takes only what is left after the tax is paid." *Matter of Watson, supra.*

"The privilege of making a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion. If granted, it may be upon such conditions and with such limitations as the legislature sees fit to create. The payment of a sum in gross, or of an amount measured by the value of the property affected, may be exacted, or the right may be limited to one or more kinds of property and withdrawn as to all others."

Matter of Delano, 176 N. Y. 486, 491.

"Neither the right to make a testamentary disposition or the right to inherit property is an inherent right. It is not guaranteed by the fundamental law. It depends entirely upon the consent of the legislature. It can withhold or grant the right, and if it grants it it may make its exercise and its extent subject to such burdens and requirements as it pleases."

Matter of Penfold, 216 N. Y. 163, 166-7.

Essentially, a state transfer tax, being a privilege tax, is not dissimilar to a state tax upon the franchises of corporations, which is also a privilege tax, and the same principles which apply to the measurement of a franchise tax on corporations should apply to a tax on transfers.

In *Home Insurance Co. v. New York*, 134 U. S. 594, 600, involving a state franchise tax on corporations, Mr. Justice Field, writing the opinion of this court, said:

"The granting of such right or privilege (to be a corporation*) rests entirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most

* The words within the parenthesis are ours.

befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year, or month, or a specific portion of its gross receipts, or of the profits of its business, *or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows.*" (Italics ours.)

As a matter of fact the New York act imposing a franchise tax on business corporations (Article 9-a, New York State Tax Law) expressly provides (section 208, subdivision 3) that:

"The term 'entire net income' means the total net income, * * * before any deductions have been made *for taxes paid or to be paid to the government of the United States* on either profits or net income or for any losses sustained by the corporation in other fiscal or calendar years whether deducted by the government of the United States or not." (Italics ours.)

A corporation's actual net income cannot be ascertained until all taxes are paid, and unless the contention herein, that measurement of privilege taxes may be made in any reasonable way, is correct, it would seem to follow that a tax based upon net income which does not permit the deduction of taxes paid to the United States, is every

bit as objectionable as a transfer tax measured by the value of property without the deduction of taxes paid to the United States. The provision of the New York statute above quoted was sustained in *People ex rel. Barcalo Manufacturing Co. v. Knapp*, 227 N. Y. 64.

That the foregoing quotation from *Home Insurance Co. v. New York* is applicable to transfer taxes is indicated by Mr. Justice Shiras in *Plummer v. Coler*, 178 U. S. 115, 137, who states:

" * * * we may regard it as established that the relation of the individual citizen and resident to the state is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right, as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the state, and we are unable to perceive any sound distinction that can be drawn between the power of the state in imposing taxes upon franchises of corporations, composed of individual persons, and in imposing taxes upon the right or privilege of individuals to avail themselves of the right to grant and to receive property under the statutes regulating the descent of the property of decedents."

In the *Delaware R. R. Tax Case*, 18 Wall. 206, 231, on the question of the jurisdiction of states to tax, this court say:

" The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation,

however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

Quoting again from *Home Insurance Co. v. New York, supra*, at pages 600-601 it was said:

"It is true, as said by this court in *California v. Pacific Railroad Co.*, 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its value is not measured like that of property, but may be fixed at any sum that the legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the legislature of the state; it cannot be furnished by the federal tribunals."

Another example of the discretion allowed the states in determining how privilege taxes shall be measured is found in the laws of several of the states which tax the transfer of shares of corporate stock. This tax in New York is two cents on each one hundred dollars of face value or fraction thereof. That the face value of corporate stock is no criterion of its actual value is a matter of common knowledge. Stock having a face value of \$100 may be actually worth \$500, or it may be actually worth nothing, but in either event the transfer of the stock is taxed at two cents per share. It may be noted that the federal tax on

the transfer of stock is computed by substantially the same method as is employed by the State of New York. No one appears to have questioned the right to thus measure the tax on the transfer of corporate stock, but if it should be held an unreasonable exercise of a state's power to refuse a deduction of the federal tax in fixing the base for the measurement of state transfer taxes on the transmission of property, would it not seem that such a decision would clearly invalidate the stock transfer taxes?

As to the supremacy of the state and the finality of its action in fixing the basis for the measurement of privilege taxes, the attention of this court is invited to the decision in *Estate of Week*, 169 Wis. 316.

To any claim that the federal estate tax should be deducted in fixing the base for state transfer taxes on the ground that the federal tax is imposed first and to tax it would be to tax a tax, the following language of this court in *Flint v. Stone Tracy Co., supra*, at page 162, is peculiarly applicable:

“ But this argument confuses the measure of the tax upon the privilege, with direct taxation of the estate or thing taxed.”

In *Knowlton v. Moore, supra*, at page 77, this court say:

“ We are bound to give heed to the rule that where a particular construction of the Statute will occasion great inconvenience, or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the Statute.”

Let us now examine as to whether or not the construction contended for by plaintiffs in error would result in inconvenience. It seems a reasonable conclusion that the legislature of a state in providing for the raising of revenue by a tax upon transfers intends to produce an amount which, although it may vary somewhat, will nevertheless be approximately the same over a period of years. Such a revenue measure is one of the component parts of a state's system of taxation whereby will be raised and made available an amount sufficient to meet the state's expenditures. Should it be required that the federal estate tax be deducted from the base upon which the state tax is to be computed, it is manifest that the amount which the state will receive must depend to a considerable extent upon the amount of taxes imposed by the United States. The remedy of the state in order to maintain its revenues intact would be to increase the rate from time to time as the impositions of the federal government are increased. The present federal tax was enacted by the revenue act of September 8, 1916. On March 3, 1917, the rates were greatly increased. Again in October, 1917, the rates were increased and again on February 24, 1919. In order to keep step with the federal government and not suffer losses of revenue, it would have been incumbent upon the state to increase its rates each time the federal tax was increased. Not only in this respect would the greatest possible inconvenience be experienced, but a decision at this time requiring the deduction of the federal tax would necessitate the refunding by the State of Pennsylvania, the State of New York and other states of vast sums of

money, which would have to be raised by increased taxation or a bond issue. Is it not much more convenient and reasonable that the states fix the bases of their transfer taxes without deduction of the federal taxes, thereby preventing the constant fluctuation of rates and avoiding the necessity of refunds?

Extreme care should be exercised in approaching the question under consideration, for an interference in one respect with the right of states to determine the measure of transfer taxes would, no doubt, be productive of a multiplicity of suits in which equitable considerations would be presented and claims made of the hardships produced. The door once opened, it is impossible to foretell to what extent the doctrine that states have not the right to measure privilege taxes as they see fit (but always within reasonable limitations) might be carried. It must be borne in mind that

" * * * there is no general supervision on the part of the Nation over State taxation, and in respect to the latter the state has, speaking generally, the freedom of a sovereign both as to objects and methods."

Shaffer v. Carter, 252 U. S. 37.

As has been heretofore suggested, the power of a state to tax transfers for a fixed amount seems undoubted and were this done such amount could not be varied because of the imposition of a federal tax. Yet a tax at a fixed amount would be much more arbitrary and more productive of inequity than the tax which is here assaulted.

To summarize the argument on this point, it is contended that transfer taxes are privilege taxes

and as such, when considered as imposed upon the universal subject of taxation, *i. e.*, the transmission from the dead to the living, may be measured in any reasonable way. It is also contended that the state's right to tax is not restricted to the universal subject of taxation but rests in part upon the power of regulation of succession, and if a state may abolish succession entirely, it may tax it to such extent as it deems necessary for the public welfare and may compute the tax in such manner as it may prescribe.

Surely the refusal of a state to deduct the federal tax in fixing the base for the measurement of transfer taxes cannot be regarded as being more arbitrary or unreasonable than a tax measured by 80% of the producing capacity of a distillery, regardless of whether or not this percentage is actually produced, and by the entire amount produced if in excess of 80%. Still a statute of the United States imposing such a tax, measured by distillery capacity, was upheld by this court in *United States v. Singer*, 15 Wall. 111.

The attention of the court is invited to the decisions of the New York courts, holding that the present federal tax is not deductible.

Matter of Bierstadt, 178 App. Div. 836; *Matter of Sherman*, 179 App. Div. 497, aff'd 222 N. Y. 540; *Matter of Carnegie*, 203 App. Div. 91, aff'd 236 N. Y. Memo. (See Advance Sheet No. 1175.)

POINT II.

THE UNITED STATES AND THE STATE BOTH TAX THE SAME SUBJECT, VIZ: "THE TRANSFER," WHICH TAKES PLACE INSTANTANEOUSLY AT DEATH. BOTH TAXES TAKE EFFECT SIMULTANEOUSLY AND ARE, THEREFORE, CUMULATIVE, NEITHER TAKING PRECEDENCE OVER THE OTHER, AND NEITHER IS REQUIRED TO BE DEDUCTED IN COMPUTING THE OTHER.

The federal tax is imposed "upon the *transfer* of the net estate of every decedent dying after the *passage* of this Act." Sec. 401, Title IV, Revenue Act of 1918. (Italics ours.) The state tax is imposed "upon the *transfer* of any property * * * When the transfer is by will or by the intestate laws of this Commonwealth from any person dying seized or possessed of the property while a resident of the Commonwealth." Sec. 1, Art. 1 of Act approved June 20, 1919. (Italics ours.)

What is this *transfer* which is the subject of taxation? In *Bouvier's Law Dictionary*, Rawle's Third Revision, p. 3308, this definition of a *transfer* is given:

"The act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter."

See also *Matter of Gould*, 156 N. Y. 423, 428, where the Court of Appeals of New York say:

" * * * the word 'transfer' in the statute is used advisedly and according to its ordinary legal signification, which is that

the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter."

This *transfer* takes effect instantaneously at death. No sooner does the breath leave the body than the property of the decedent passes and vests in his successors. There is no suspension of ownership for the minutest fraction of a second, and the transmission from the dead and receipt by the living are merged into this operation which we designate as the *transfer*. The transfer may be likened to the coming together of a person's hands, the transmission from the dead taking place when the right hand touches the left and the receipt by the living when the left hand touches the right. There is no difference whatsoever in point of time for the right hand touches the left at the same instant the left hand touches the right. So with the transfer, the transmission from the dead takes place at the same instant as the receipt by the living.

"The transfers take place necessarily at the moment of death, for the will on the one hand and the intestate laws on the other operate and speak from that date." *Gleason and Otis on Inheritance Taxation, Third Edition*, p. 28.

"Upon the intestate's death his estate passed *eo instanti* to the persons who, by virtue of the intestate law, were entitled thereto." *Matter of Ramsdill*, 190 N. Y. 492, 495.

"The tax (so-called) is the toll or impost appropriated to itself by the State for or in connection with the right of succession to property. It accrues, therefore, at the same time that the estate vests, that is upon the death of the decedent." *Matter of Penfold, supra*, p. 167.

"The tax imposed by the statute is upon the interests transferred by will or under the intestate law of the state. *The devolution of the property and the right of the state have their origin at the same moment of time.* The ascertainment of the value of the taxable interest and the fixing of the tax necessarily takes place subsequent to the death. But the guide is the value at the time of the death, when the interests were acquired." *Matter of Westurn*, 152 N. Y. 93. (Italics ours.)

"Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." *Knowlton v. Moore, supra*, p. 56.

Having, as we believe, established that both the federal and state taxes are upon the *transfer* and that this takes place instantaneously upon death, we are led to inquire by what method of reasoning it can be contended that either tax is imposed prior to the other or that either takes precedence over the other. As a matter of fact, there is and can be no difference in the incidence of the two taxes and they are therefore both concurrent and cumulative.

There seems to be no doubt of the right of sovereignties to impose concurrent taxes, and in

no sense does it appear that where there is a common or universal subject of taxation, the imposition of a tax thereon by a state is an interference with the power of congress to levy taxes.

"Under our constitutional system both the National and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established." *Knowlton v. Moore, supra*, p. 60.

In a case involving the corporation franchise tax law of New York, it was said:

"The United States and the State of New York in such matters are independent powers, neither of which need yield to the other. Each taxes, and so seizes, a part of the same income; but there is no more reason why the state must recognize the deductions of the United States before calculating its percentages than that the United States must recognize those of the state, which it surely need not, if it choose to ignore them." *Gorham Manufacturing Co. v. Travis*, 274 Fed. 975, 981.

In the dissenting opinion in the Supreme Court of Pennsylvania (*Frick's Estate*, 277 Pa. 242), an attempt is made to show that the federal tax necessarily precedes the state tax and that the United States having the right to first collect its tax, the state can only tax what is left. An example is cited which supposes a federal tax of 60% of the estate and a state tax of an equal

amount. This, of course, is a supposititious case which in all probability never will arise, but even conceding that such a case might arise, it would not be a necessary conclusion that the state could take as the basis of its tax only what was left after the federal tax was taken out. If congress should by a proper apportionment impose a direct tax upon real estate, a situation would arise in which both the federal and state governments would tax the same thing on a valuation basis. If the value of a given piece of real estate was \$10,000, upon which a federal tax of \$200 fell due on a given day, it does not seem likely that it would be contended that a state tax on the same real estate, falling due the same day, could be imposed on only the sum of \$9,800 because the United States had collected a tax of \$200. But the same situation might arise in respect to such a tax on real estate as is referred to in the dissenting opinion in relation to a tax on transfers; that is, both the federal and state governments might increase their respective rates of taxation to 60%. It is not necessary here to discuss, or for this court to decide, what might happen in the event that two sovereignties, each having concurrent jurisdiction to tax, should impose rates which in the aggregate would exceed the value of the property. If and when such an altogether unlikely event occurs, then will be time enough to decide what the rights of the respective parties are.

POINT III.

THE STATUTE OF THE STATE OF PENNSYLVANIA IMPOSING THE TAX IN NO WAY CONTRAVENES, CONFLICTS WITH OR INFRINGES UPON ANY PROVISION OF THE CONSTITUTION OF THE UNITED STATES IN SO FAR AS THE QUESTIONS DISCUSSED IN THIS BRIEF ARE CONCERNED, AND IN RESPECT TO THOSE QUESTIONS, THE APPEAL MUST FAIL.

Respectfully submitted,

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